Sandra P. Davis v. U.S. General Accounting Office

Docket Nos. 00-05 and 00-08

Date of Decision: July 11, 2003

Cite as: Davis v. GAO (7/11/03)

Before: Anne M. Wagner, Chair; Michael W. Doheny, Vice-Chair; Jeffrey S. Gulin, Member

Whistleblowing

Retaliation

Prohibited personnel practice

Performance appraisal

Personnel action

Predominant performance

DECISION ON APPEAL FROM THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

This matter is before the Personnel Appeals Board (PAB or the Board) on appeal[1] from the July 26, 2002 Initial Decision of the Administrative Judge (AJ) denying in part, and granting in part, the claims of Petitioner Sandra Davis, a Band II analyst in the Denver Regional Office of the U.S. General Accounting Office (GAO or the Agency). In her three consolidated Petitions for Review, Petitioner charged various Agency personnel with committing prohibited personnel

[1] Both GAO and Petitioner timely appealed from the Initial Decision. However, only GAO filed the supporting brief required by the Board's regulations. *See* 4 C.F.R. §28.87(c). In light of Petitioner's failure to prosecute her appeal beyond the initial filing of the notice, the Board deems her appeal to have been abandoned. Under the Board's regulations, a party has 25 days from the filing of a notice of appeal within which to file a supporting brief. 4 C.F.R. §28.87(c). The brief must "identify with particularity those findings or conclusions in the initial decision that are challenged and shall refer specifically to the portions of the record and the provisions of statutes or regulations that assertedly support each assignment of error." *Id.* The Board has reviewed the entire record and affirms the findings and conclusions not otherwise addressed in this Decision. The AJ's findings of fact on those matters are supported by substantial evidence and his conclusions are consistent with law.

practices in violation of 5 U.S.C. §2302(b) by retaliating against her for whistleblowing and for engaging in protected activity, and by lowering her performance appraisal on the basis of conduct that did not affect performance and in a manner inconsistent with GAO rules and/or regulations. The Agency prevailed on all but the last of these claims.

The issue on appeal is the one raised by GAO, namely, whether the AJ erred in finding that the Agency violated 5 U.S.C. §2302(b)(12) in lowering two of the ratings on Petitioner's 1999 performance appraisal. For the reasons discussed below, we find that the Administrative Judge correctly ruled that GAO violated 5 U.S.C. §2302(b)(12) and affirm his Decision.

Background

A. Factual Background

Sandra Davis began her employment with GAO in 1987. Hearing Transcript (Tr.) 459. Since 1992, she was employed as a Band II evaluator in the Denver Regional Office, working in the Health, Education and Human Services (HEHS) Division. Tr. 459-60. At all times relevant to this proceeding, she was assigned to the Health Care Core Group of the Veterans' Affairs and Military Health Care (VA&MHC) issue area. Petitioner's Exhibit (P.Ex. 2); Tr. 459-60. The Director of the VA&MHC issue area was Stephen Backhus. Tr. 44. Cynthia Bascetta was the Associate Director. Tr. 985-86. In late 1997, Ronald Guthrie became the Assistant Director in charge of the Health Care Core Group in Denver. Tr. 168, 478-81, 626-27.

Prior to FY 1999, Petitioner consistently received high performance ratings in all job dimensions for which she was rated. *See* P.Ex. 2. Specifically, in each of the five annual appraisal periods from September 1994 to September 1998, she received the top rating of "outstanding" in the "teamwork" category. P.Ex. 2.

In October 1998, Petitioner was designated as the Evaluator-in-Charge (EIC) on a Veterans Administration "reasonable charges" job. P.Ex. 39 at 2. Her immediate supervisor on this assignment was Sheila Drake, a Band III Assistant Director located in Washington, D.C. Tr. 141-42, 234-36. During the 1999 rating period from October 1, 1998 to September 30, 1999, Petitioner worked 181.9 staff days, 115 of which were devoted to the "reasonable charges" job. P.Ex. 37.

During this same period, the work environment in the Denver Regional Office was becoming increasingly tense. In December 1998, Stephen Backhus received an anonymous letter containing numerous criticisms of Ronald Guthrie's management practices, including, *inter alia*, allegations of excessive travel. P.Ex. 10. In response, Mr. Backhus went to Denver in order to meet with members of the Health Care Core Group individually, to discuss the letter and the issues raised therein. Tr. 48-50, 466-67.

In her individual meeting with Mr. Backhus, Petitioner was critical of Ronald Guthrie's management style, and also, his government travel, which she considered to be excessive. P.Ex. 63. These sentiments were expressed by other employees as well. P.Exs. 18, 63. In January

1999, Mr. Backhus returned to Denver to report to the Health Care Core Group employees that he did not find merit to any of the allegations in the anonymous letter. He further advised employees: "[I]f you can't work with Ron [Guthrie], it's likely that you can't work with me, and I'll be glad to help you to the extent I'm able trying to find another place for you to work." Tr. 107-08, 1225.

At the end of January 1999, Cynthia Bascetta assigned Petitioner to work as an "advisor" on another VA job. Tr. 1022, 1122. The EIC on this VA "enrollment" job was Lisa Gardner, a Band II evaluator in Denver. The Assistant Director supervising the enrollment job was Ronald Guthrie. Tr. 989, 992. In addition, Petitioner was removed as the EIC—but continued to work—on the "reasonable charges" job. Tr. 238-39, 518, 995.

Concomitantly, Petitioner began to inquire after possible openings in other divisions, specifically, in the National Security and International Affairs Division's (NSIAD) International Relations and Trade (IRT) issue area. Tr. 500-03; P.Ex. 24 at 1; P.Ex. 51 at 2. In early February 1999, she notified Stephen Backhus of her desire to transfer to NSIAD/IRT. Tr. 109, 503-04. Mr. Backhus spoke to an Assistant Director of IRT regarding a possible transfer. Tr. 1235-36. The likelihood of such a transfer appeared remote to Mr. Backhus, because although some Denver staff did perform IRT work on an *ad hoc* basis, NSIAD/IRT did not have a core group in Denver. Tr. 1236; Respondent's Exhibit (R.Ex. 16). As of mid-1999, IRT work in Denver was being phased out. Tr. 999, 1167-68. Petitioner continued to discuss her requested transfer with apparent confidence in its occurrence. She did agree, however, to continue working on the VA enrollment job until the projected completion date of March 30, 1999. Tr. 533, 536-37.

However, during March, a dispute arose between Lisa Gardner and Petitioner regarding the nature and scope of the latter's involvement in the VA enrollment job. Although Ms. Gardner had set and documented specific expectations for other evaluators on the enrollment job on an Expectation Setting Record (Form 209), she did not complete a form 209 with respect to Petitioner's assignment on that job. Tr. 1106-07, 1113-14, 1118. As an "advisor," Petitioner understood her role on the VA enrollment project to be limited, and, in any event, scheduled to end as of March 30, 1999. Tr. 511, 514-15. Ms. Gardner, on the other hand, expected Petitioner to complete specific ongoing assignments that were, in her estimation, crucial to the timely completion of the enrollment job. Tr. 1105, 1131-31. Ms. Gardner's dissatisfaction culminated in a "counseling memorandum" to Petitioner, dated April 8, 1999, in which she accused Petitioner of being "uncooperative, discourteous and disrespectful." R.Ex. 15.

On April 12, 1999, Petitioner filed her first charge with the PAB Office of General Counsel (PAB/OGC) alleging that the Agency retaliated against her for engaging in whistleblowing and other protected activities. Right to Appeal Letter (June 9, 2000), Pleading File, Tab 1.

In a memo dated April 13, 1999 from James Solomon, Acting Denver Regional Manager, Petitioner was notified that she was to remain a member of Denver's VA&MHC core group due to staffing needs; there was no NSIAD/IRT core group in Denver into which she could transfer; and, further, there was insufficient work in the NSIAD/IRT issue area to otherwise justify assigning her to IRT matters. R.Ex. 16. He also cautioned her that an unacceptable rating could be given to an employee who "expresses an unwillingness to work with certain people." *Id.* at 3.

Petitioner was thereafter temporarily assigned to work on a job relating to sleepwear flammability outside the VA&MHC issue area, where she carried out her duties satisfactorily. Tr. 1244-46.

In June 1999, Richard Hembra, then Assistant Comptroller General for HEHS, visited the Denver office with Stephen Backhus for purposes of discussing general expectations for "some of these working relationship issues" that were unresolved in the group. Tr. 908. At a group-wide meeting, a participant posed a question to Mr. Hembra suggesting that GAO managers hesitated to impose adverse actions on employees for fear of subsequent legal challenges. Tr. 911-12. Mr. Hembra replied that he had "been sued by the best of them" and would not be deterred from taking action. Tr. 912, 974-75, 1250-51. In the follow-up individual sessions, Petitioner told Mr. Hembra of her pending grievance and her belief that his comments had been directed at her. Tr. 915-16.

Sheila Drake was the rater for Petitioner's FY 1999 performance appraisal; James Solomon was the reviewer. R.Ex. 17. Prior to giving Petitioner her final rating, Ms. Drake received feedback from James Solomon and Ronald Guthrie and, following instructions from Stephen Backhus, also consulted with Lisa Gardner. Tr. 265-71. Ms. Drake took their comments, as well as Lisa Gardner's counseling memorandum, into account, in giving Ms. Davis an "outstanding" rating in four categories and "exceeds fully successful" in three categories. Tr. 248, 254, 270. Specifically, after considering Lisa Gardner's input, Ms. Drake gave Petitioner an "exceeds fully successful" rating in the teamwork category. Tr. 268-72.

Ms. Drake sent Petitioner's rating to Stephen Backhus for review, as she did with all of her performance appraisals. Tr. 247-48, 256-57, 286. Mr. Backhus returned the rating to Ms. Drake twice, each time with instructions to lower the rating. Finally, Ms. Drake, at Mr. Backhus' direction, lowered Petitioner's ratings in "written communication" and "teamwork" to fully successful. Tr. 247-48; 256-59.

Petitioner subsequently filed two additional charges with the PAB/OGC. In the third one, filed in November 1999, she accused GAO of improperly coercing Ms. Drake into lowering her 1999 annual performance appraisal to reflect alleged behaviors not included in published performance standards. *See* Right to Appeal Letter (July 10, 2000), Pleading File, Tab 14. She thereafter filed two Petitions for Review with the Board in July 2000, which were consolidated under Docket No. 00-05. The third Petition for Review, assigned Docket No. 00-08, was filed with the Board in August 2000 and ultimately consolidated with the first two Petitions.

In her Petitions, Petitioner alleged that GAO retaliated against her for engaging in protected activities identified as: (1) submitting an affidavit in April 1998 to a Civil Rights Office (CRO) investigator on behalf of a co-worker in the Denver office who had filed a discrimination complaint; (2) disclosing mismanagement, abuse and possible violations of travel regulations by Ronald Guthrie; (3) disclosing that Mr. Backhus had improperly directed certain employees to transfer out of the Denver Health Care Core Group; and (4) filing charges with the PAB. She further alleged that this retaliation took the form of a (1) denial of transfer to NSIAD; (2)

threatened disciplinary action for insubordination; (3) verbal reprimand; and (4) lowering of her performance appraisal for reasons unrelated to her performance.

Petitioner requested a variety of remedies, including work assignments permanently outside the management control of certain GAO officials; written assurance of permanent employment as a Band II evaluator in the Denver office until her retirement; expungement of charges or references to actions threatened or taken against her from Agency records; disciplinary action against Agency officials who violated the GAO Table of Penalties; and a corrected 1999 performance appraisal.

B. Initial Decision

In the Initial Decision, the Administrative Judge rejected Petitioner's whistleblower claims under 5 U.S.C. §2302(b)(8). Specifically, while finding that the four communications at issue (Petitioner's CRO affidavit, Petitioner's statements to Stephen Backhus concerning Ronald Guthrie, Petitioner's February 1999 statements to Sharon Cekala regarding Mr. Backhus' comments to the Health Care Core Group, and Petitioner's charges filed with the PAB Office of General Counsel) were "disclosures," he concluded that they were nevertheless not protected within the meaning of the Whistleblower Protection Act (WPA). He examined each disclosure in turn and concluded that they concerned policy disagreements or vague, broad accusations rather than information that could reasonably be perceived as evidencing a violation of law, rule or regulation, gross mismanagement or waste of funds, or abuse of authority as required by 5 U.S.C. §2302(b)(8)(A)(i) and (ii). Initial Decision at 23-26. In the case of Petitioner's disclosure concerning Ronald Guthrie's travel, the AJ also concluded that even if the allegation might arguably reflect a violation of law, rule or regulation, the lack of specificity surrounding the allegation deprived it of protected status under the WPA. *Id.* at 26.

The Administrative Judge also denied Petitioner's claim that the Agency violated 5 U.S.C. §2302(b)(9). Initial Decision at 30. That provision makes it a prohibited personnel practice for an Agency to take or fail to take, or threaten to take or fail to take, a personnel action in retaliation for the employee's participation in certain protected processes, including the exercise of appeal or grievance rights granted by any law, rule, or regulation; testifying for, or otherwise lawfully assisting, any individual exercise of appeal rights; cooperating with or disclosing information to the Inspector General or Special Counsel; or, for refusing to obey an order that would require the employee to violate a law.

The Administrative Judge concluded that Petitioner's meetings with Mr. Backhus and Ms. Cekala did not constitute the exercise of an appeal or grievance right granted by any law, rule or regulation, and therefore did not come within the protective ambit of 5 U.S.C. §2302(b)(9). Initial Decision at 31-32. He did conclude, however, that the submission of the affidavit in conjunction with a co-worker's discrimination complaint and filing charges with the PAB/OGC were both arguably protected activities within the meaning of §2302(b)(9), and thereafter undertook an extensive analysis of these claims. *Id.* at 32, 39.

With regard to the affidavit, the Administrative Judge credited Petitioner's testimony that she had discussed her EEO meeting with James Solomon, the Acting Denver Regional Manager, directly after it occurred, and thus found that she established that Mr. Solomon had the requisite knowledge necessary to support her retaliation claim. Initial Decision at 32-34. However, he further ruled that because Petitioner identified only James Solomon as having such knowledge, the inquiry would be confined to whether Mr. Solomon retaliated against Petitioner. *Id.* at 32. Noting that the personnel actions in which Mr. Solomon arguably participated—namely, denying the requested transfer to NSIAD/IRT, threatening disciplinary action, and lowering her performance rating for 1999—did not occur until January 1999, the AJ deemed the intervening lapse of nine months between these actions and Petitioner's participation in the discrimination matter in April 1998 to be sufficiently long to point against retaliation. *Id.* at 34. That Petitioner had, during this same period, received a performance appraisal with ratings of five "outstandings" and one "exceeds fully successful," and was assigned to be the EIC on the VA "reasonable charges" job also argued, in the Administrative Judge's view, against finding retaliation. *Id.* at 34.

Although finding that the lapse in time and intervening favorable personnel actions were sufficient to defeat the §2302(b)(9) claim, the AJ nevertheless explored the relationship between Petitioner's participation in the EEO process and each of the alleged personnel actions. Specifically, characterizing Petitioner's expectation of a transfer into the IRT area as unfounded, the Administrative Judge determined that the alleged denial of a transfer was, in any event, due to Management's operational needs, rather than retaliatory motives. Initial Decision at 35-36.

With regard to the threatened disciplinary action, the AJ concluded that Mr. Solomon's intimation of potential adverse actions was not in response to Petitioner's participation in the EEO process, but rather, to her unwarranted resistance to performing Health Care Core Group work based on her unfounded expectation of an upcoming transfer to IRT. Initial Decision at 37-38.

The Administrative Judge similarly rejected the contention that Mr. Solomon's involvement in Petitioner's 1999 performance rating constituted retaliation. Initial Decision at 38. Although Sheila Drake did consult with him and took his negative comments into account in proposing Petitioner's initial rating, the AJ found that there was no evidence that Mr. Solomon was involved in coercing Ms. Drake into lowering the proposed initial rating as demanded by Mr. Backhus. *Id.* at 38. The Administrative Judge further concluded that there was no evidence of a nexus between Mr. Solomon's negative comments to Ms. Drake during the initial rating process and Petitioner's participation in the EEO process seventeen months earlier. *Id.* at 39.

Turning then to the question of whether the Agency retaliated against Petitioner for filing charges with the PAB Office of General Counsel, the AJ identified the challenged actions to include the alleged threats of disciplinary action by James Solomon and Richard Hembra, and the lowered performance rating. Initial Decision at 40. With regard to the first charge filed on April 12, 1999, the Administrative Judge concluded that there was no evidence indicating that Mr. Solomon was aware of it when he issued his allegedly threatening memorandum to Petitioner the next day on April 13, 1999. *Id.* The AJ further credited Mr. Hembra's testimony that his remarks at the June 1999 meeting were not intended to threaten or intimidate any

employee from exercising protected rights but merely to convey the view that he did not care whether employees pursued employment related litigation. *Id.* The AJ also credited his testimony that he became aware of Petitioner's charge during his individual meeting with her after the group meeting at which he made the allegedly threatening comments. *Id.* at 40-41.

As for the lowered performance rating, the Administrative Judge stated that resolution of the claim turned on whether the officials responsible for the appraisal were aware of Petitioner's April 12, 1999 charge when the allegedly retaliatory reduction in the rating took place. On this point, the AJ found the record lacking and concluded that it would be improper for him, in the absence of such evidence, to assume whether and when such officials became aware of the charge. Initial Decision at 41. Specifically, noting that the evidence was "very clear" that the lowered rating was largely due to Mr. Backhus, the AJ nevertheless refused to impute to Mr. Backhus particular knowledge of Petitioner's then-pending PAB charge from his admitted general awareness of litigation among the employees in the Denver group. *Id.* at 42. In the Administrative Judge's view, Mr. Backhus' approval of a cash award for Petitioner only three months after she filed her first PAB charge militated against assuming animus on his part against Petitioner's protected activities. *Id.* at 42.

Petitioner's second charge, filed with the PAB/OGC on August 19, 1999, concerned the allegedly threatening remarks of Richard Hembra in the June 1999 meeting. The only allegedly retaliatory action to occur after August 19 was the lowered performance rating. Again, the AJ concluded that Petitioner failed to provide sufficient evidence that any of the officials allegedly involved in lowering her rating—and in particular, Stephen Backhus—actually knew of the August 19 charge. *Id.* at 43-44. The AJ also noted that Petitioner did not allege any retaliatory action after the filing of the third charge on November 9, 1999, and that this charge also could not support a (b)(9) claim. He thus concluded that Petitioner failed to meet her burden of proof that the Agency violated 5 U.S.C. §2309(b)(9). *Id.* at 44.

In addition to the claims of alleged retaliation, the Administrative Judge also denied Petitioner's contention that her 1999 performance appraisal violated 5 U.S.C. §2302(b)(10), which prohibits an agency from discriminating against employees for conduct that does not adversely affect job performance. The AJ concluded that her reliance on that provision was inapt insofar as it is designed to prohibit actions against employees for off-duty conduct or interests that are unrelated to job performance. Initial Decision at 45 (citing *Thompson v. Farm Credit Admin.,* 51 MSPR 569, 585 (1991), and *Harvey v. MSPB,* 802 F.2d 537, 551 (D.C. Cir. 1986)). Because, in Petitioner's case, the lowered performance rating was, in the AJ's view, a response to her on-the-job conduct, it did not fall within the purview of this provision. *Id.* at 45.

Conversely, the AJ did find that GAO violated 5 U.S.C. §2302(b)(12) which makes it a prohibited personnel practice for any official to take or fail to take a personnel action if doing so violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. §2301. Initial Decision at 45-57. Although the Petition for Review filed in Docket No. 00-08 cited 5 U.S.C. §2302(b)(11), the Administrative Judge, looking to the substance of the charge, treated the citation to (b)(11) as a clerical error and proceeded to adjudicate the claim as one arising under §2302(b)(12). *Id.* at 2 n.1.

As a threshold matter, the AJ found that GAO Order 2430.1, its 1992 Supplement and the 1997 manual implementing the Performance Appraisal System for Band I, II, and III Employees constitute a "rule or regulation" implementing a merit system principle within the meaning of §2302(b)(12). Initial Decision at 47, 57. He also found that these personnel rules require that performance be evaluated based upon predominant performance (*Id.* at 46), and establish procedures for rating and reviewing employee performance and for resolving conflicts between a rater and reviewer with regard to a particular rating. *Id.* at 47-48. Finally, he agreed with Petitioner that Stephen Backhus' pressure on Sheila Drake to lower Petitioner's rating violated these personnel rules, and therefore, violated 5 U.S.C. §2302(b)(12). *Id.* at 47, 57.

In so concluding, the AJ relied on the testimony of the rater, Sheila Drake, which he specifically credited over that of Stephen Backhus, that Mr. Backhus had returned Petitioner's performance appraisal twice with instructions to lower the rating in teamwork and written communication. Initial Decision at 49-50. As Petitioner's rater, Sheila Drake did not agree with the changes but ultimately lowered the appraisal as directed by Mr. Backhus. *Id.* at 49.

Rejecting Mr. Backhus' contention that he did not instruct anyone to lower Petitioner's appraisal, the Administrative Judge indicated that his credibility determination was based not only on Mr. Backhus' demeanor, but also on the inconsistency and implausibility of his testimony on a number of other points. Initial Decision at 50. Specifically, he deemed Mr. Backhus' explanation for not approving Petitioner's requested transfer in February 1999—as due to staff shortages in the VA&MHC group—to be undercut by the apparent absence of such needs a month earlier when he invited employees who were unhappy with Ronald Guthrie's management style to transfer out of the Core Group. *Id.* at 50-51. Petitioner's assignment outside the Core Group in April further undermined, in the AJ's view, Mr. Backhus' characterization of the VA&MHC as overworked and understaffed. *Id.* at 51.

Similarly, the Administrative Judge strongly rejected Mr. Backhus' testimony that his assignment of Petitioner to work with Mr. Guthrie in January 1999, after she had complained about him, and subsequent removal of her as the EIC on the "reasonable charges" job was for her benefit and reflected "a vote of confidence in her." Initial Decision at 51. Rather, the AJ found that the value placed in GAO on being EIC, as well as the lack of a clearly defined role as an "advisor" on the "reasonable charges" job, supported Petitioner's view that these actions were taken not for her benefit but rather as retaliation for her earlier criticism. *Id.* at 52-53. While reiterating his conclusion that these actions did not "rise to the level" of prohibited retaliation under §§2302(b)(8) or (9), he nevertheless found them to be probative evidence that Mr. Backhus' subsequent involvement with Petitioner's performance appraisal "was tainted by considerations that were irrelevant to Order 2430.1 and that were antithetical to an objective performance appraisal system." *Id.* at 53.

Likewise, the Administrative Judge rejected Mr. Backhus' testimony that his discussion with Ms. Drake concerning Petitioner's appraisal was appropriate because he had knowledge of her performance. Initial Decision at 54. Based on the record, the AJ concluded that Mr. Backhus had "virtually no personal knowledge of Petitioner's performance on the three main jobs to which she was assigned during the 1999 appraisal period." *Id.* at 54. The AJ also found Mr. Backhus' explanation that his intervention in the appraisal process was intended only to ensure

that Petitioner's appraisal included the proper narrative to match the ratings to be belied by his lack of concern with the appraisal's patent failure to include a required description of the expectations given to Petitioner on the enrollment job. *Id.* at 55. That Petitioner's final appraisal did not contain any narrative on the teamwork and written communications components of the enrollment job further undermined Mr. Backhus' testimony on this point. *Id.* at 56.

Crediting Ms. Drake's testimony that Mr. Backhus instructed her to lower the rating, the Administrative Judge found that Mr. Backhus failed to provide an adequate explanation for acting as the *de facto* reviewer in Petitioner's case, and failed to assume responsibility for lowering the rating as required by GAO Order 2430.1. Initial Decision at 54. The AJ concluded that Mr. Backhus, having thus violated the rater/reviewer provisions of GAO Order 2430.1 and its implementing manual and guidance, violated 5 U.S.C. §2302(b)(12). In the 1999 review process, the AJ concluded, "Mr. Backhus distorted and ultimately violated the merit system principles designed to ensure that annual appraisals are based upon employees' performance and not upon the personal—and in this case hostile—motives of a particular supervisor." *Id.* at 57.

As a remedy, the Administrative Judge ruled that, having proven a violation of §2302(b)(12), Petitioner was entitled to the "make whole" relief provided under 5 U.S.C. §1214. Initial Decision at 58. Consequently, he found that such a remedy requires that GAO restore Petitioner's 1999 performance appraisal to the rating proposed by Ms. Drake prior to Mr. Backhus' directive to lower it. *Id.* at 58. He further held that since GAO employees are given pay and awards based on merit, Petitioner "may also be entitled to have her earnings adjusted for 1999 and thereafter, based on the revised performance appraisal." *Id.* at 58. Under the Back Pay Act, 5 U.S.C. §5596, Petitioner would be entitled to interest on such back pay. *Id.* at 58-59.

However, the Administrative Judge denied Petitioner's claim for compensatory damages on the grounds that Petitioner never alleged unlawful discrimination, and therefore, was not entitled to the relief provided in the Civil Rights Act of 1991. Initial Decision at 60; *see* 42 U.S.C. §1981a. Moreover, relying on *Bohac v. Department of Agriculture,* 239 F.3d 1334 (Fed. Cir. 2001), the AJ concluded that even if Petitioner had prevailed on her retaliation claims under 5 U.S.C. §§2302(b)(8) and (9), she would still not be entitled to compensatory damages under 5 U.S.C. §1214. Initial Decision at 61. Consequently, he declared that dispute over damages to be moot. *Id.* at 61.

C. Agency Appeal

GAO appeals from the Initial Decision alleging a number of points of error.
As a threshold matter, the Agency contends that the Administrative Judge erred in treating Docket No. 00-08 as stating a claim under 5 U.S.C. §2302(b)(12) and, in any event, in finding that GAO was on notice of Petitioner's intent to allege such a violation. Respondent's Brief on Appeal (Resp.Br.) at 16-17. On the merits, GAO claims that the Administrative Judge erred as a matter of law in finding that it had violated §2302(b)(12). *Id.* at 22. Specifically, the Agency argues that neither the rater/reviewer procedure nor predominant performance requirement constitutes a rule or regulation within the meaning of §2302(b)(12). *Id.* at 28, 30. Alternatively,

GAO maintains that even if these provisions are rules or regulations, they do not implement a merit system principle as contemplated by 5 U.S.C. §2301(b)(6). *Id.* at 31.

The Agency also alleges that the Administrative Judge employed the wrong standard in finding that Petitioner's performance in teamwork and written communication warranted an "exceeds fully successful" rating, and erred in increasing her rating as a remedy for the violation of the rater/reviewer provision. *Id.* at 34.

Analysis

On appeal, the Board will affirm an initial decision unless it is shown to be based on an erroneous interpretation of a statute or regulation, is arbitrary, capricious, an abuse of discretion, or is otherwise inconsistent with law. 4 C.F.R. §28.87(g). While the Board's review of the record is *de novo*, it will not ordinarily overturn a finding of fact "unless that finding is unsupported by substantial evidence in the record viewed as a whole." *Id.* The Board will also consider whether the initial decision was made in a manner inconsistent with required procedures that resulted in harmful error. 4 C.F.R. §28.87(g)(4).

A. Notice of the 5 U.S.C. §2302(b)(12) Claim

GAO argues, as a threshold matter, that the AJ erred in treating the third Petition for Review as alleging, *inter alia*, a violation of 5 U.S.C. §2302(b)(12). As grounds, the Agency asserts that it lacked "fair notice" of such a claim, and consequently, was prejudiced by the AJ's disposition. Resp.Br. at 16-20. The record in this case does not support GAO's contention.

The third Petition for Review alleges that named officials (including Stephen Backhus) coerced Petitioner's supervisor, Sheila Drake, into lowering her performance appraisal "to reflect alleged behaviors not included in published GAO performance standards; and GAO policy requiring performance appraisals to be based on predominant performance," and that this action violated, *inter alia,* 5 U.S.C. §2302(b)(11). Docket No. 00-08 ¶¶3 & 4 (b). Pleading File, Tab 15. However, §2302(b)(11) deals exclusively with violations of veterans' preference requirements, which are undisputedly not in issue in this case. Rather, the sole thrust of the charge is that GAO violated its own published performance standards and policies, a claim squarely falling within the purview of §2302(b)(12). That statutory provision prohibits employees from taking or failing to "take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title." That this provision, §2302(b)(12), was previously codified as §2302(b)(11)[2] plainly suggests the technical nature of Petitioner's erroneous reference to the

[2] The Civil Service Reform Act (CSRA) previously identified eleven prohibited personnel practices, the last of which—then codified as §2302(b)(11)—prohibited any employee from taking or failing "to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title." Pub.L. 95-454, Title I, §101(a). In 1998, Congress added an additional prohibition against personnel actions in violation of veterans'

latter. *See Blount v. OPM,* 87 MSPR 87, 89 n.2 (2000). Indeed, even GAO acknowledges that it was not misled by the mistaken reference to §2302(b)(11) into believing that Petitioner was asserting a veterans' preference claim. Resp.Br. at 20.

Rather, GAO argues that Petitioner failed to identify with sufficient specificity the rule, regulation or merit system principle alleged to have been violated and that this deficiency deprived it of "fair notice" of the §2302(b)(12) claim. Resp.Br. at 18-19. GAO further contends that it reasonably deduced from this alleged lack of particulars that Petitioner was, in fact, merely reiterating her reprisal claims under §§2302(b)(8) and (9). *Id.* at 20-21.

Neither of these contentions is supported by the record. That GAO understood Petitioner's reference to "published GAO performance standards; and GAO policy requiring performance appraisals to be based on predominant performance" in Docket No. 00-08 ¶¶3 and 4(b) as implicating GAO Order 2430.1 is reflected by its admission of the Order, its 1992 Supplement and the October 1997 Performance Appraisal System for Band I, II and III Employees into evidence as exhibits (R.Exs. 20, 21, 22).

Moreover, the extensive testimony at the hearing addressing predominant performance and the rater/reviewer system belies GAO's argument that it did not have "fair notice" of Petitioner's claim. Early in the hearing, counsel for Petitioner questioned witnesses with regard to the "GAO performance Appraisal System Manual" (Tr. 207-08) and specifically, whether the Manual contained a policy relating to predominant performance. Tr. 210.

In fact, when Petitioner attempted to testify as to her understanding of predominant performance "based on the GAO performance appraisal orders," GAO counsel objected on the grounds that it constituted "inappropriate expert opinion or explanation of the regulations by this lay witness." Tr. 587. Moreover, when, during the course of her testimony, Petitioner referenced "GAO regulations . . .[that] talk about predominant performance," her attorney specifically directed her attention to that part of the Order that addresses predominant performance. Tr. 589 (referring to GAO Order 2430.1 Supp., P.Ex. 45). Similarly, when she testified about "another kind of appraisal policy book that talks about what to do when they have multiple supervisors on jobs," her attorney directed her attention to the relevant portion of the 1997 Manual (P.Ex. 44). Tr. 589. Other witnesses also testified at length about predominant performance and the rater/reviewer system. *See, e.g.,* Tr. 263-64, 276-77, 285-86 (Drake); 302-03 (Reynolds).

GAO can hardly claim to have lacked notice in this regard when its own attorneys queried witnesses on direct examination as to the meaning of the "term predominant performance that's used in the General Accounting Office in connection with performance appraisals." *See* Tr. 802-03 (Solomon); 1266 (Backhus). One of these witnesses who was Petitioner's reviewer, James Solomon, responded that the term was "one of the descriptors used in our performance appraisal manuals." Tr. 803. Similarly, Stephen Backhus described the term in the context of "the way that the system works." Tr. 1267. In the case of Mr. Backhus' testimony, GAO also specifically questioned him as to whether consideration of Petitioner's performance on the

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preference requirements. The veterans' preference provision was codified at 5 U.S.C. §2302(b)(11), resulting in a renumbering of the existing §2302(b)(11) to §2302(b)(12).

"reasonable charges" job was consistent with the concept of predominant performance. Tr. 1266-67.

GAO cites *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), as support for its position that the Administrative Judge improperly concluded that it had notice of Petitioner's §2302(b)(12) claim. Resp.Br. at 17. In that case, however, the Supreme Court actually rejected the defendant's argument, similar to that espoused by the Agency here, that a plaintiff's failure to plead all the facts necessary to meet his *prima facie* case of discrimination deprived it of "fair notice." *Swierkiewicz*, 534 U.S. at 512-13. Instead, noting liberal pleading requirements under the federal rules, the Court stated that the appropriate response by a defendant to a pleading that fails to specify allegations in a manner that provides sufficient notice is to obtain clarification through discovery and other pretrial procedures. *Id.* Likewise here, if GAO was uncertain with regard to the particular basis for Petitioner's §2302(b)(12) claim, it could have pursued a more definite statement through the prolonged discovery process in this case. GAO now asserts that Petitioner was not forthcoming in response to interrogatories directed at the "§2302(b)(11)" claim. *See* Resp.Br. at 19 n.15. If so, then GAO's remedy was to move to compel discovery, rather than to assume that Petitioner did not intend to allege a violation of a rule or regulation implementing a merit system principle. *See* Resp.Br. at 20-21.

However, the Board finds it unlikely, in light of the extensive testimony regarding GAO's rules for performance evaluations, including that offered by GAO, that the Agency actually prepared its evidentiary case based on an erroneous assumption that Petitioner intended her §2302(b)(12) claim to be merely subsumed within her reprisal claim. But if GAO did so, then the Board finds this purported construction of the pleading to have been unreasonable given that the third Petition for Review separately charges violations of §2302(b)(8) and (b)(9) arising from the lowered rating, in addition to alleging a violation of GAO rules and regulations governing performance appraisals. Thus, the Petition explicitly distinguishes between the reprisal and the putative §2302(b)(12) claims.

GAO further maintains that its reading of the Petition as limited to reprisal claims was warranted by the fact that the charge submitted to the PAB Office of General Counsel was so restricted. *See* Resp.Br. at 21. The Board does not agree that the initial charge was confined to allegations of retaliation. In any event, however, the Board's regulations do not dictate that a Petition for Review be confined to the charge as initially framed by a charging party before the PAB/OGC. On the contrary, they explicitly contemplate that the PAB/OGC might "refine the issues" during the course of the investigation into the charge. 4 C.F.R. §28.12(a). Likewise, employees are not precluded from including a claim in the Petition for Review that was not expressly identified in the initial charge but that arose out of the same operative facts investigated by the Office of General Counsel.

B. Regulatory Effect of Rater/Reviewer and Predominant Performance Provisions

A provision is a "rule or regulation" for purposes of 5 U.S.C. §2302(b)(12) if it meets the definition of "rule" in 5 U.S.C. §551. *See Special Counsel v. Byrd,* 59 MSPR 561, 580 n.18 (1993), *aff'd,* 39 F.3d 1196 (Fed. Cir. 1994) (Table); c*f. Mitchell Energy & Dev. Corp. v. Fain,*

311 F.3d 685, 688 (5th Cir. 2002) (adopting Administrative Procedure Act (APA) definition of "rule" in finding that statement of Secretary of Labor regarding state unemployment compensation systems was rule for purposes of ERISA federal savings clause). The statutory definition of "rule" set forth at 5 U.S.C. §551(4) is: "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."

In *Byrd,* the Merit Systems Protection Board (MSPB) found that a provision of the Federal Personnel Manual (FPM) prescribing conditions for making temporary limited appointments was a rule for purposes of the then-designated §2302(b)(11). *Special Counsel v. Byrd,* 59 MSPR at 580 n.18 In so concluding, the MSPB cited *Pollard v. OPM*, 52 MSPR 566, 569 n.1 (1992), holding that an FPM provision containing guidance on military leave was a "rule" for purposes of the Board's exercise of regulation review authority under 5 U.S.C. §1204(f), because it met the definition of "rule" in 5 U.S.C. §551(4). *Id*. In *Pollard*, the MSPB relied on its longstanding decision in *NTEU v. Devine,* 8 MSPR 640, 642 n.1 (1981), wherein it held that an FPM Supplement provision dealing with promotions met the definition of a "rule" in 5 U.S.C. §551(4), and was therefore subject to the Board's review authority under 5 U.S.C. §1205(e). Here, the "predominant performance" standard for rating GAO evaluator performance and the provisions establishing a rater/reviewer mechanism for rating employees are also clearly Agency statements designed to implement or prescribe GAO's statutorily mandated personnel system and certainly describe GAO's organization, procedures and practices. Consequently, they both fall within the broad definition of "rule" in 5 U.S.C. §551(4) and as such, are rules for purposes of §2302(b)(12).

As a threshold matter, the Board has long recognized that GAO Order 2430.1 is a "regulation adopted by the Comptroller General to comply with that statutory obligation" under the GAO Personnel Act of 1980 to create a regulatory performance appraisal program for GAO employees as required under 5 U.S.C. §4302. *Hendley v. GAO*, 2 PAB 33, 49 (1990). As an Agency statement designed to implement the performance appraisal system mandated by 31 U.S.C. §732(d)(1), the Order is a rule as defined by 5 U.S.C. §551(4) and, therefore, within the purview of §2302(b)(12). The Board reaches the same conclusion with regard to the 1992 Personnel Supplement to GAO Order 2430.1. *See NTEU v. Devine,* 8 MSPR at 642. Thus, to the extent that the predominant performance standard emanates from GAO Order 2430.1 and is explicitly adopted in the 1992 Supplement, the Board finds that it is a rule for purposes of §2302(b)(12).

The same analysis dictates finding that the 1997 Performance Appraisal System for Band I, II and III Employees (Performance Manual or BARS Manual) is also a rule within the meaning of §2302(b)(12) because, as an Agency statement designed to implement, interpret, or prescribe GAO's performance appraisal system, it clearly meets the definition of a rule in 5 U.S.C. §551(4).[3] GAO mistakenly argues that the rater/reviewer provision of the Performance Manual

[3] Having concluded that GAO's 1992 Personnel Supplement and 1997 Performance Manual independently meet the definition of "rule" in 5 U.S.C. §551(4) for purposes of §2302(b)(12), the Board declines to rule on the question of whether either is incorporated by reference into GAO Order 2430.1. *See* Resp.Br. at 24-25, 30. However, the Board notes in this regard that

is not a rule for purposes of §2302(b)(12) because it is permissive and interpretive without the force and effect of law. Resp.Br. at 25-26. However, the statutory definition of "rule" in §551(4) is not limited to substantive or mandatory regulations. On the contrary, it expressly encompasses agency statements that *interpret* law or policy and describe the agency's practices and procedures. Moreover, where, as here, the issue concerns rules implementing merit system principles, which are, by definition, exempt from the procedural requirements of the APA, the relevance of the APA distinction between substantive and interpretive rules is questionable. [4] But even if GAO was correct that such a distinction is significant for assessing whether a provision is a rule for purposes of §2302(b)(12), its argument ultimately fails because the rater/reviewer provision, which is contained in the Performance Manual, is both substantive and mandatory. The MSPB has long held that the establishment of an invalid performance standard is not merely procedurally defective, but also "violates an important substantive right of the employee." *Callaway v. Dep't of Army ,* 23 MSPR 592, 597 n.6 (1984). Quoting from an *amicus* brief submitted by OPM, the MSPB stated there that:

> "the utilization of performance standards which comply with 5 U.S.C. §4302(b)(1) is at the very heart of the performance appraisal system contemplated in the CSRA. . . . Violation of the statutory criteria, . . . can hardly be described as an error in the application of some procedural requirement. The performance standard is the substance of the appraisal system. If the standard used to determine performance does not comply with the statutory requirements the performance rating is substantively flawed and represents far more than a procedural error."

Callaway, 23 MSPR at 597 n.6; s*ee Yorker v. EEOC*, 25 MSPR 538, 541 (1985) (failure to communicate standards in violation of 5 U.S.C. §4302(b)(2) deprived employee of substantive right).

Here, the rater/reviewer provision in the Manual reflects GAO's judgment that this process can best provide for the accurate assessment of the employee's performance based on objective criteria, and carries out GAO's statutory obligation under 31 U.S.C. §732(d)(1). Thus, the alleged deviation from GAO's prescribed rating process represents a substantive, rather than procedural, defect.

GAO's primary reliance on *Advanced Display Systems v. Kent State University,* 212 F.3d 1272, 1282-83 (Fed. Cir. 2000), for its position that the Personnel Supplement and Manual were not incorporated by reference is questionable. That case is readily distinguishable because the issue there arose in the specific context of a patent law doctrine called "invalidity by anticipation," wherein a patent is deemed invalid if every element of an invention is described within the "four corners of a single, prior art document" or if the material is incorporated by reference into the single document.

[4] In so recognizing, the Board does not mean to suggest that a distinction between mandatory requirements and discretionary guidance is irrelevant to the ultimate question of whether the Agency has violated a rule.

The 1997 Performance Appraisal System for Band I, II, and III Employees also reflects mandatory requirements. In *Hendley v. GAO*, 2 PAB 33, 49 (1990), the Board found that procedures in the BARS Manual and GAO Order were mandatory because they fulfilled the statutory requirements for a performance appraisal system in 5 U.S.C. §4302. More recently, in *Pernell v. GAO,* the Board applied the same analysis in finding that the "Performance Appraisal System for Administrative Professional and Support Staff" Manual establishes mandatory requirements because it "clearly tracks the requirements of the statute in creating a performance appraisal system for GAO." *Pernell v. GAO,* PAB Docket No. 01-03 (Aug. 15, 2002) at 28, *aff'd en banc* (Mar. 13, 2003) at 18.

In the same way, the 1997 Performance Manual at issue here "clearly tracks the requirements of the statute in creating a performance appraisal system" for GAO evaluators. Specifically, the Manual—and the rater/reviewer provision contained therein—implements 5 U.S.C. §4302 by establishing standards and procedures for the "accurate evaluation of job performance on the basis of objective criteria" as required by 5 U.S.C. §4302(b)(1) and (3). As in *Pernell*, because the Manual "so obviously tracks the statute and the Agency has failed to explain what constitutes GAO's required appraisal system if not the [Manual]," the Board finds that the Manual is mandatory.[5] *See Pernell* (Aug. 15, 2002) at 28.

C. Performance Rules and Merit System Principles

GAO contends that the rater/reviewer and the predominant performance provisions do not implement or directly concern §2301(b)(6) because they deal with employee evaluations and do not address the retention or separation of employees or the correction of inadequate performance. Resp.Br. at 32. However, the Agency does not provide any authority for the proposition that §2301(b)(6) is solely directed at the separation of poor performers or the correction of inadequate performance. *Cf. Bracey v. OPM,* 83 MSPR 400, 419 (1999) (Slavet dissenting) (recognizing that the performance appraisal system required by 5 U.S.C. §4302(b)(1) carries out the mandate of §2301(b)(6)), *rev'd,* 236 F.3d 1356 (Fed. Cir. 2001). GAO's reliance on *Brown v. VA,* 44 MSPR 635 (1990) in this regard is misplaced because neither the holding in that case (that an agency may rely on instances of unacceptable performance occurring prior to the initiation of a Performance Improvement Plan) nor the rationale addresses, much less offers any support for, narrowly construing the meaning of

[5] The Agency's reliance on *Roberts v. GAO*, 2 PAB 18 (1990), is misplaced. *See* Resp.Br. at 26-27. In that case, the Administrative Judge found that the Agency had met its statutory obligation to communicate an employee's performance standards because, under the particular facts of that case, the employee knew or should have known what was expected of him and how to achieve those expectations. Under those circumstances, a technical deviation from the precise manner set forth in the Manual fell short of a prohibited personnel practice. *Id.* at 33. The discussion of the mandatory or permissive nature of the provision in question therefore is mere dicta. This Board's recent disposition of the issue in *Pernell v. GAO* properly places the emphasis on the relationship between the provision and the implementation of the statutory requirements for performance evaluations. *See Pernell v. GAO,* PAB Docket No. 01-03 (Aug. 15, 2002) at 28, *aff'd en banc* (Mar. 13, 2003) at 18.

§2301(b)(6).

Both the rater/reviewer and predominant performance provisions implement §2301(b)(6). A rule "implements" a merit system principle if it "gives practical effect" to it. *See Wells v. Harris*, 1 MSPR 208, 243 (1979). *See also Special Counsel v. Dep't of Veterans Affairs,* 75 MSPR 219, 222 (1997); *In re Implementation*, 14 MSPR 145, 146-47 (1982); *Joseph v. Devine*, 19 MSPR 66, 69 (1984).

The merit system principle underlying §2302(b)(6) is that employees should be evaluated and dealt with based upon the adequacy of their performance. *See Wells v. Harris,* 1 MSPR at 242-43. The predominant performance provision provides a substantive standard for assessing the adequacy of the performance while the rater/reviewer process is a mechanism for ensuring the accuracy of the evaluation. As such, both are plainly designed to carry out and give practical effect to §2302(b)(6).

Moreover, a rule comes within the purview of §2302(b)(12) if it "directly concerns" a merit system principle, that is, if its connection to the principle is clear. *See Special Counsel v. Harvey,* 28 MSPR 595, 602 (1984), *rev'd on other grounds,* 802 F.2d 537 (D.C. Cir. 1986). Where, as here, the rules establish a substantive standard for evaluating employees and the mechanism for achieving an accurate rating, the connection between them and the merit principle directed at assuring that employees be judged based on the adequacy of their performance is manifestly clear.

D. Consistency with Board Precedent

GAO wrongly contends that by asserting jurisdiction over Petitioner's §2302(b)(12) claim, the Administrative Judge disregarded this Board's holding in *Poole v. GAO* that mere disagreement with a rating, absent more, does not constitute an action over which the Board has jurisdiction. Resp.Br. at 33-34. The argument fails to recognize the distinction between an adverse action subject to the Board's jurisdiction under 31 U.S.C. §753(a)(1) and a personnel action subject to the Board's jurisdiction under 31 U.S.C. §753(a)(2).

While a lowered performance appraisal is not an adverse action for purposes of the Board's jurisdiction under 31 U.S.C. §753(a)(1), it is a personnel action for purposes of establishing a prohibited personnel practice subject to the Board's jurisdiction under 31 U.S.C. §753(a)(2). That provision empowers the Board to consider cases arising from prohibited personnel practices under 31 U.S.C. §732(b), which explicitly incorporates 5 U.S.C. §2302(b). We need look no farther than the statute defining prohibited personnel practices to find that "personnel action" expressly includes performance evaluations. 5 U.S.C. §2302(a)(2)(A)(viii). *See King v. HHS*, 133 F.3d 1450, 1453 (Fed. Cir. 1998) (recognizing performance evaluation as a personnel action for purposes of §2302(b)(8)); *Schlosser v. Dep't of Interior*, 75 MSPR 15, 22 (1997) (finding lowered performance appraisal to be a personnel action under §2302). As a personnel action within the meaning of §2302, Petitioner's performance evaluation was properly before the Board. *Cf. Pessa v. Smithsonian Inst.*, 60 MSPR 421, 425 (1994) (allegedly unfair "fully

successful" rating was personnel action under §2302(a)(2)(A) and therefore subject to MSPB jurisdiction).

E. Restoration of Rating

Under 5 U.S.C. §1214, when an agency is found to have committed a prohibited personnel practice, the Special Counsel is authorized to seek corrective action, which generally requires cancellation of the improper action and a return to the *status quo ante*. *See Bonggat v. Dep't of Navy,* 56 MSPR 402, 413 (1993); *In re Frazier,* 1 MSPR 163, 199 (1979), *aff'd in part, dismissed in part,* 672 F.2d 150 (D.C. Cir. 1982). The fact that GAO employees are authorized to bring prohibited personnel practice complaints before the PAB does not alter the nature or scope of the relief available to them upon the successful prosecution of such claims. *See Murphy v. GAO,* 2 PAB 132, 140 (1992); *Marshall v. GAO,* 2 PAB 270, 333-34 (1993); *Rojas v. GAO,* PAB Docket No. 96-08, slip op. at 45 (1998). Therefore, the AJ properly concluded that Petitioner, upon having successfully prosecuted her claim of a prohibited personnel practice under §2302(b)(12), was entitled to be made whole by having her 1999 performance appraisal restored to the rating proposed by Ms. Drake prior to Mr. Backhus' improper intervention.

Consequently, there is no merit to GAO's contention that having met her burden of proof on the merits of her claim, Petitioner was required to bear the additional burden of demonstrating the propriety of the originally proposed "exceeds fully successful" rating. *See* Resp.Br. at 35. Certainly, neither of the cases cited by GAO stands for such a proposition. In *Luecht v. Dep't of Navy*, 87 MSPR 297 (2000), for example, the MSPB vacated the initial denial of jurisdiction over an employee's whistleblowing claim upon finding that his complaint contained non-frivolous allegations of a violation. In so doing, the MSPB reiterated the burden of proof placed on those alleging such claims, but at no point expanded that burden to include a requirement that the employee demonstrate by a preponderance of the evidence that he would be entitled to restoration of the *status quo* upon proving the merits of his claim. *See id.* at 307.

The decision in *Begay v. HHS,* 52 MSPR 447, 448 (1992), is similarly inapposite. There, after an extensive review of the record, the MSPB found that the employee did not identify the basis for, or pursue, her prohibited personnel practices claim before the AJ. In light of that evidentiary deficiency, it concluded that she failed to carry her burden of proof on that claim. But nothing in that opinion supports GAO's position that employees asserting a prohibited personnel practices claim must separately demonstrate entitlement to the *status quo ante* remedy.

GAO's effort to litigate the accuracy of Ms. Drake's proposed rating at this juncture in this proceeding is therefore misplaced. *See* Resp.Br. at 37-40. Ms. Drake testified, and the AJ found based on the record evidence, that the original rating sent to Mr. Backhus was based on predominant performance. Initial Decision at 48-50; Tr. 263-64, 285. He further found, based on witness credibility, that the lowered rating was a "direct result of Mr. Backhus's instructions to Ms. Drake." Initial Decision at 53. Given that Mr. Backhus failed to explain adequately why he was involved in Petitioner's rating and that he "had virtually no personal knowledge of petitioner's performance on the three main jobs to which she was assigned during the 1999

appraisal period," there was substantial evidence to support the AJ's conclusion that the original rating reflected Petitioner's predominant performance. *See id.* at 53-54.

F. Other Arguments

The Agency also argues that the rater/reviewer provision was not violated in this instance because it does not preclude other supervisors from providing input to the rating. GAO claims that since Mr. Backhus was within Petitioner's chain of command, he was entitled to provide input into her rating, that in fact, he provided such input into 30 other ratings, and that his input into Petitioner's rating does not constitute a violation of the rater/reviewer provision of the Manual. Resp.Br. at 41. However, as the AJ found, the Agency failed to show that he had sufficient knowledge of Petitioner's performance to warrant the extent of his involvement here. Initial Decision at 54. Whether Mr. Backhus had knowledge of the other employees' performance for which he provided input was never raised.

The Agency further argues that even if Mr. Backhus did violate the rater/reviewer provision, that action would not justify an increase in Petitioner's rating: "Restoration of the rating would not be an appropriate remedy for the pressure placed on petitioner's supervisor to lower her rating. . . ." Resp.Rep.Br. at 8; *see* Resp.Br. at 42. This unsupported argument misses the point of remedy for a prohibited personnel practice. In this case, Petitioner is entitled to be placed "as nearly as possible in the *status quo ante*" position, meaning that, as the injured party, she should "'be placed, as near as may be, in the situation [s]he would have occupied if the wrong had not been committed'." *White v. USPS*, 931 F.2d 1540, 1542 (Fed. Cir. 1991) (quoting *Kerr v. Nat'l Endowment of Arts*, 726 F.2d 730, 733 n.3 (Fed. Cir. 1984)).

The AJ gave credence and weight to Ms. Drake's testimony that she had initially rated Petitioner's performance as "exceeds fully successful" in the critical dimensions of "written communication" and "teamwork." Initial Decision at 49; *see* Tr. 257, 271-72. Accordingly, since Petitioner would have received Ms. Drake's initial rating but for the fact that Ms. Drake was inappropriately coerced by Mr. Backhus to lower the rating, Petitioner should be given the initial rating in order to restore her to the *status quo ante*.

The Agency also raises the argument that the failure of Mr. Backhus to accept responsibility for the ratings was at most harmless error on GAO's part, and that in order to establish harmful error, Petitioner would have to show that the ratings that resulted from Mr. Backhus'actions were not in accordance with the performance standards. Resp.Br. at 42. The real issue, however, is not whether Mr. Backhus accepted responsibility for the ratings, but rather, whether his involvement in Petitioner's ratings was improper.

Based on the evidence, the AJ concluded that by directing Ms. Drake to lower Petitioner's rating in two categories, Mr. Backhus violated the rater/reviewer provision of the Manual and thus, violated 5 U.S.C. §2302(b)(12). Initial Decision at 57. The Administrative Judge went into extensive detail explaining why Mr. Backhus was less credible than Ms. Drake regarding the lowering of Petitioner's performance appraisal rating. *Id.* at 48-57. The AJ determined that Mr. Backhus' explanation regarding his involvement in the rating process, that he "'was in the chain

of command for that assignment and had knowledge of her performance during the rating period,'" was not credible. *Id.* at 49-50. In particular, he found that Mr. Backhus' testimony was evasive, discursive, implausible and conflicted with Ms. Drake's more credible recollections. *Id.* at 50-55 (quoting Tr. 1255). He also found that Ms. Drake credibly testified that she based Petitioner's rating on the principle of "predominant performance" but that she was instructed by Mr. Backhus to lower Petitioner's ratings in two categories. *Id.* at 49. Ms. Drake also testified that despite her disagreement with the lowered ratings, she made the changes. Tr. 256-59.

Harmless error is defined by the Board regulations as:

> error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the petitioner to show that, based upon the record as a whole, the error was harmful, i.e., caused substantial harm or prejudice to his or her rights.

4 C.F.R. §28.61(d).

The question, as defined by the MSPB,[6] is "whether it is within the range of appreciable probability that this omission had a harmful effect upon the decision of the agency." *Bergman v. HHS*, 4 MSPR 396, 398 (1980) (citing *Parker v. Def. Logistics Agency*, 1 MSPR 505 (1980)). Harmful error cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Stephen v. Dep't of Air Force*, 47 MSPR 672, 681, 685 (1991). The AJ specifically found that the lowering of Petitioner's rating was a direct result of Mr. Backhus' actions. Initial Decision at 53. We find that the evidence supports this conclusion. Accordingly, we conclude that Mr. Backhus' improper involvement in Petitioner's performance appraisal rating caused substantial harm by changing the outcome of Petitioner's performance appraisal, and thus, was harmful error.

Conclusion

For the foregoing reasons, the Decision of the Administrative Judge is affirmed.

SO ORDERED.

[6] The "harmless error" provision applicable to the Merit Systems Protection Board, 5 C.F.R. §1201.56(c)(3), is similar to the provision in the Personnel Appeals Board regulations.